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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1551

STEVEN F. ETHIER,

Petitioner,

vs.

UNITED STATES POSTAL SERVICE, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (Appendix to Petition, pp. A-1 through A-9) is reported at 590 F. 2d 733. The United States District Court for the District of Minnesota did not file a written opinion in this case.

QUESTIONS PRESENTED

Whether the court below correctly applied this Court's standard for cases involving the duty of fair representation?

Does the decision of the Eighth Circuit in this case conflict with decisions in similar cases in other Circuit Courts of Appeal?

STATEMENT OF CASE

The statement of the facts made in the Eighth Circuit's decision in this case is accurate and complete and for the convenience of the Court is set out below:

> Steven F. Ethier was employed by the United States Postal Service (USPS) as a letter carrier. He was a member of the National Association of Letter Carriers, AFL-CIO (NALC), and Branch 28 of that Association. He served from January, 1974, to January, 1975, as a steward of the Branch. The National Association is signatory to a collective bargaining agreement with the USPS.
>
> On March 13, 1975, Ethier was served with a Notice of Proposed Removal letter advising him that he would be discharged no earlier than thirty days from the date he received the notice. The letter advised him that he had a right to protest the proposed action by filing a grievance pursuant to the provisions of Article XV, section 2 of the 1973 National Agreement. That section provides as follows:
>
> SECTION 2. Procedure.
>
> Step 1: The employee must discuss a grievance with his immediate supervisor within fourteen (14) days of when the employee or Union has learned or may reasonably have been expected to have learned of its cause. The employee may be accompanied by his steward or a union representative, if he so desires. * * * The Union shall be entitled to appeal an adverse decision to Step Two of the grievance procedure within ten (10) days after receipt of the Employer's decision. Such appeal shall be in writing to the head of the installation or his designee.
>
> The Union may also initiate a grievance at Step One in accordance with the above.
>
> * * *

> [Step 4:] The failure of the aggrieved party or his representative to present the grievance within the prescribed time limits of the steps of this procedure including arbitration, shall be considered as a waiver of the grievance.
>
> It is agreed that in the event of a dispute between the Union and the Employer as to the interpretation of this Agreement, such dispute may be initiated as a grievance at the National level without going through the preceding steps.

On March 17, 1975, Ethier called the Union steward who had succeeded him and told him of the proposed discharge. He asked the steward to assist him in filing and processing a grievance contesting the proposed discharge. In the two week period following the call the steward, who was new to the job, investigated the matter and discussed it with USPS representatives on seven occasions. Ethier was present at some of those meetings. The steward stated in an affidavit that he believed that the discussions satisfied the Step 1 requirements of the Agreement.

On April 1, 1975, the steward filed a written grievance concerning the discharge with the USPS. He stated in an affidavit that he believed that if a written notice was necessary the notice was timely because it was filed within fourteen days of the date that the Union had been notified of the proposed discharge.

On April 15, 1975, the Postmaster wrote Ethier and advised him that the reasons given in the Notice of Charges were fully supported by the evidence and warranted his dismissal from the Service. He also advised Ethier of his right to appeal to the Civil Service Commission. Ethier, however, elected to have the matter submitted to arbitration and the Union processed the grievance to arbitration. In that proceeding the arbitrator held:

> [The] [g]rievance is dismissed as nonarbitral. No Step 1 discussion between grievant and his immediate supervisor was held within 14 days after the occurrence giving use to the grievance and thus no arbitral jurisdiction exists.

He stated that:

> The Union contends that this grievance was initiated by the Union and that no confrontation between the grievant and his immediate supervisor is required.
>
> The grievant here had been a Union steward and clearly must have known of the contractual requirements as to timeliness.
>
> In the case of the 1973 National Agreement the parties have specifically provided that "The Union may also initiate a grievance at Step 1 in accordance with the above."
>
> Clearly, the 1973 National Agreement extended the time for Step 1 and also provided for the Union to file a grievance but if the Union filed it, it had to do so in accordance with "the above"—which, inter alia, provides that the employee must discuss a grievance with his immediate supervisor within 14 days of the occurrence of the grievance.
>
> In this case grievant had until March 31, 1975, in which to initiate a discussion. None was held. The Union's discussion on April 4, 1975, was not with the immediate supervisor and grievant was not present. [Emphasis deleted.]
>
> *Ethier v. United States Postal Service*, 590 F.2d 733, 734-735, (8th Cir. 1979).

After having two earlier pro se complaints containing essentially the same allegations dismissed without prejudice, on October 11, 1977, Ethier filed the pro se complaint which initiated this action. The complaint alleged *inter alia* that the National Association of Letter Carriers breached its duty of fair representation in

perfunctorily processing his grievance. On February 9, 1978, the District Court granted the National Association of Letter Carriers' Motion for Summary Judgment and the United States Postal Service's Motion to Dismiss. Ethier appealed to the Eighth Circuit, which affirmed the District Court's decision in all respects in a decision filed on January 11, 1979. The Eighth Circuit held that the Union had not violated the duty of fair representation and stated:

> "The allegations of the complaint and statements in the affidavit do not support an inference that the Union handled the grievance in a perfunctory manner [footnote omitted].
>
> . . . .
>
> Certainly this record does not support an inference that the Union steward here was unconcerned, unsolicitous, or indifferent. To the contrary, he pursued the grievance with vigor and erred only in failing to anticipate how the Agreement would ultimately be construed by an arbitrator. We cannot impose liability for such failure." 590 F.2d at 736.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

A. THE COURT BELOW CORRECTLY APPLIED THIS COURT'S STANDARD FOR CASES INVOLVING THE DUTY OF FAIR REPRESENTATION.

This case involves nothing more than a straight forward application of the standard established by this Court in *Vaca v. Sipes*, 386 U.S. 171 (1967) and confirmed in *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976). These cases hold that a union owes its members a duty of fair representation.

Where the union, as in this case, decides to process a member's grievance through to arbitration, the focus of inquiry becomes whether it did so in good faith. A mistake by the union at some stage of the grievance procedure does not render the union liable where its handling of the matter has not been perfunctory, arbitrary or discriminatory, *Vaca v. Sipes*, supra at 194. This rule is clear from the opinion of this Court in *Hines v. Anchor Motor Freight*, supra at 570-571:

> To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. As the District Court indicated, this involves more than demonstrating mere errors in judgment.
>
> Petitioners are not entitled to relitigate their discharge merely because they offer newly discovered evidence that the charges against them were false and that in fact they were fired without cause. The grievance processes cannot be expected to be error free. The finality provision has sufficient force to surmount occasional instances of mistake. But it is quite another matter to suggest that erroneous arbitration

> decisions must stand even though the employee's representation by the union has been dishonest, in bad faith, or discriminatory; for in that event error and injustice of the grossest sort would multiply.

A mistake, therefore, in handling some aspect of a grievance does not cause a breach of a union's duty of fair representation where the union's mistake is not due to its handling the grievance in a perfunctory, arbitrary or bad faith manner.

The opinion of the Eighth Circuit in *Ethier v. United States Postal Service*, supra, clearly states that the court applied the above described test for fair representation established by this Court.

> The allegations of the complaint and statements in the affidavit do not support an inference that the Union handled the grievance in a perfunctory manner. At best the allegations support an inference that the Union steward erred in construing the time limits set forth in Article XV, section 2 of the Agreement—an error which was understandable in the light of the specific language of the Agreement. Moreover, USPS management officials met with the Union steward on seven occasions in the period before the time limits expired and never told him that an initial meeting must be held with Ethier's immediate supervisor. The fact that the arbitrator ultimately held against Ethier on the issues of contract interpretation and waiver does not give rise to an inference of bad faith as perfunctory handling by the steward. *Ethier v. United States Postal Service*, supra at 736.

In *Ethier*, the Eighth Circuit recognized that the arbitrator, himself, may have misinterpreted the contract when he decided that the union steward's efforts did not comply with step one. The court below held, however, that even if a mistake in contract construction was attributable to the union, the error was insufficient to establish that the union had processed the grievance in a

perfunctory manner. In sum, the court below specifically applied this Court's standard to the facts of this case. No basis exists for issuing a writ of certiorari.

B. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IN THIS CASE DOES NOT CONFLICT WITH THE DECISIONS OF THE SIXTH CIRCUIT COURT OF APPEALS.

Petitioner asks this Court to issue a writ of certiorari to review the decision of the Eighth Circuit in this case on the ground that it conflicts with decisions of the Sixth Circuit in *Milstead v. International Brotherhood of Teamsters*, 580 F.2d 232 (6th Cir. 1978) and *Ruzicka v. General Motors Corporation*, 523 F.2d 306 (6th Cir. 1975), rehearing denied 528 F.2d 912. As this Court has previously stated, a writ of certiorari will issue to resolve differences between the circuits only ". . . in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1922). A comparison of the Eighth Circuit's decision in this case with the opinions of the Sixth Circuit in the cases cited by Petitioner discloses no difference between these circuits on the governing rule of law nor any apparent difference as to the application of that rule to the facts presented. In all three cases, the courts simply applied the approach formulated in *Vaca* to determine whether union conduct had been perfunctory.

The explanation of the different result in *Ethier* from that reached in *Milstead* and *Ruzicka* turns on the different facts presented and not on the difference in the law applied. This case involves the misinterpretation of an ambiguous contract provision by either the union steward who processed the grievance or by the arbitrator who decided it. The court below held such an error, if

made by the union, did not violate its duty of fair representation. In contrast, *Ruzicka v. General Motors Corporation*, supra, decided by the Sixth Circuit and finding a violation of the duty, involves a union's failure to file a grievance notice timely when the union knew of the deadline and there is no reasonable explanation for the failure. Similarly, in *Milstead v. International Brotherhood of Teamsters*, supra, also decided by the Sixth Circuit and finding a violation of the union's duty, the union agent failed to appraise himself of the contract provisions applicable to a member's grievance. The very different facts involved in all of these cases rather than use of different rules of law account for their results. Therefore, Petitioner's contention that the Sixth and Eighth Circuits have developed conflicting tests for a union's duty of fair representation must be rejected.

C. THE DECISION IS NOT IN CONFLICT WITH OTHER CIRCUIT COURT DECISIONS.

Petitioner also asserts that the test of perfunctory conduct applied by the Eighth Circuit below conflicts with the test used by the Fourth Circuit in *Griffin v. International Union U.A.W.*, 469 F.2d 181 (4th Cir. 1972) and by the Ninth Circuit in *Robesky v. Qantas Empire Airways*, 573 F.2d 1082 (9th Cir. 1978). Petitioner appears to contend that the Fourth and Ninth Circuits impose a greater duty on the union in discharge situations than does the Eighth Circuit. This assertion is unwarranted. Although in the *Griffin* and *Robesky* opinions the courts recognize that it is especially important for unions to avoid arbitrary processing of a discharge grievance, nothing in those opinions sets forth a separate standard for determining the union's duty of fair representation in such cases. Furthermore, nothing in the decision of the Eighth Circuit below suggests that it does not also regard the avoidance of arbitrary conduct in discharge cases as very important. For these reasons, there is no basis for finding a conflict between the decision below and the Fourth and Ninth Circuit cases relied upon by Petitioner.

CONCLUSION

The Union Respondents submit, for the reasons presented above, that the court below correctly applied this Court's standard for cases involving the duty of fair representation, that no conflict exists among the circuits, and that no other reason warrants review of the decision below by this Court.

Respectfully submitted,

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